Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Consumer Protection in the Broadband Era	)	WC Docket No. 05-271

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

CINGULAR WIRELESS LLC

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REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC hereby submits its reply to the comments filed in response to the Commission's *NPRM* concerning Consumer Protection in the Broadband Era.[1]

I. THE COMMENTS DEMONSTRATE THAT THERE IS NO BASIS FOR IMPOSING CONSUMER PROTECTION REGULATIONS ON BROADBAND INTERNET ACCESS UNDER TITLE I AT THIS TIME

At the outset, Cingular agrees with CTIA that the rapid growth of Internet-based services accessible through a single device such as a wireless terminal "highlights the need for a deregulatory national framework for all broadband services."[2] As CTIA pointed out, "sound public policy requires that [the Commission] intervene" to protect consumers' interests "only where the market has not sufficiently protected consumers. The Commission should, therefore, regulate the broadband industry with a light regulatory touch, if it regulates at all."[3] Given the many levels of regulation that may potentially apply to a given application or service, Cingular agrees that the Commission should apply only the lightest degree of regulation in any given

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1 *Consumer Protection in the Broadband Era,* WC Docket 05-271, *Notice of Proposed Rulemaking* (*NPRM*)*,* included in *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.,* CC Dockets 02-33, 01-337, 95-20, 98-10, WC Dockets 02-242, 05-271, *Report and Order and Notice of Proposed Rulemaking,* FCC 05-150 (Sept. 23, 2005) (*Wireline Broadband Order*), *summarized,* 70 Fed. Reg. 60259 (Oct. 17, 2005).

2 *See* CTIA Comments at 6-7.

3 *Id.* at 7.

instance, rendering inapplicable more onerous regulations — "the Commission should allow consumers a seamless experience by "regulating down" to the *least* regulated element of that service."[4]

This minimalist approach to regulation of broadband Internet access is, in fact, commanded by Congress. Numerous commenters agreed with Cingular that Congress did not intend to subject the provision of broadband Internet access to a plethora of regulations in the name of consumer protection, citing the national policy incorporated in 47 U.S.C. § 230(b)(2) that the Internet should be free of state and federal regulation and should instead be subject to free market forces.[5] As a result, the Commission's Title I authority does not provide a basis for imposing such regulation. This is not only the view of those opposing the adoption of regulations; [6] even some commenters *favoring* regulation of broadband Internet access service acknowledged that Title I may not provide sufficient authority.[7]

As commenters pointed out, the Commission has repeatedly found that the broadband Internet access market is competitive, warranting little to no regulation.[8] The Commission would have to overcome a heavy presumption to reverse course now — it would have to depart from precedent such as the *Broadband Wireline Order* and find that there has been a market failure of so devastating a proportion as to overcome the anti-regulation, pro-marketplace policy set forth in the statute by Congress.

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4 CTIA Comments at 8.

5 *See* Cingular Comments at 3-4; *accord* AT&T Comments at 3-4; CTIA Comments at 12; Comcast Comments at 10-11.

6 *See* Cingular Comments at 3-5; Comcast Comments at 9-11; Time Warner Comments at 5-7.

7 *See* Comptel Comments at 4; Pac-West Comments at 1-2.

8 *See, e.g.,* Time Warner Comments at 3-5.

None of the commenters calling for regulation provided any evidence that there has been such a market failure.[9] In fact, they simply assumed that there was a problem requiring regulation without any evidence that the problem exists, is likely to occur, or even can occur.[10] The absence of any record showing that there is a significant problem justifying a regulatory solution precludes the Commission from adopting the proposed regulations, The FCC may adopt only rules that are necessary and to remove those that are not; it does not have authority to adopt unnecessary rules.[11] A rule imposed to prevent something that has not been shown to exist is unnecessary and therefore lacks a valid basis and purpose. Moreover, the Commission must provide a reasoned basis for its actions and avoid arbitrary decisionmaking.[12] That is, agency rules must be supported by record evidence,[13] as well as a valid basis and purpose which

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9 *See* National Consumer Law Center Comments at 8-14; AARP Comments at 2-7.

10 *See, e.g.,* National Consumer Law Center Comments at 8 ("The unauthorized switching of broadband service providers (slamming) is a deceptive and abusive practice that the Commission must not leave for the marketplace to provide consumer protections."). It is noteworthy that the National Consumer Law Center did not provide a single example of this occurring. Several commenters, however, pointed out that it is doubtful that it is even possible for this to occur. *See, e.g.,* Comcast Comments at 15 ("[I]t is not technically feasible for a provider to switch a customer's broadband service absent the customer's express consent. And there is zero evidence that slamming type problems have occurred in the broadband marketplace."); NCTA Comments at 14; Time Warner Comments at 18;

11 47 U.S.C. § 154(i) (FCC authorized to prescribe such rules and regulations "as may be necessary"; *id*. § 303(r) (same); *id.* § 161(b) (FCC directed to "repeal or modify any regulation it determines to be no longer necessary in the public interest").

12 5 U.S.C. § 706; *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co*., 463 U.S. 29, 43 (1983); *see, e.g*., *Tripoli Rocketry Association, Inc. v. ATFE*, No. 04-5453, Slip op. at 14 (D.C. Cir. decided Feb. 10, 2006); *Petroleum Communications, Inc. v. FCC,* 22 F.3d 1164, 1172 (D.C. Cir. 1994).

13 *See, e.g*., 5 U.S.C. § 706; *Tripoli Rocketry Association,* Slip op. 13-14 (no deference is due where agency action is not supported by factual evidence); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir. 2004) ("[W]e reverse an agency's decision when it 'is not supported by substantial evidence, or the agency has made a clear error in judgment.'") (quoting *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000)); *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (courts will "strike down, as arbitrary, agency action that is devoid of needed factual support").

demonstrates a rational connection between the presented facts and the decision taken.[14] Rules must also be necessary and serve the public interest.[15]

The pro-regulation commenters did not supply a valid reason for regulating. Moreover, they did not even acknowledge that Congress has decreed a policy of reliance on market forces and competition, rather than regulation, and instead simply called for the promulgation of regulations as a policy matter.[16] In the absence of any evidence that there is a problem requiring a regulatory solution, it would be arbitrary for the Commission to adopt such regulations. Moreover, to the extent the Commission finds there to be evidence of abuse that warrants departing from the policy of non-regulation established by Congress, any regulations adopted must be consistent with the purpose for which it is adopted and not be overbroad.[17]

No commenter provided any policy justification for applying the proposed regulations to CMRS providers; nor did any commenter address the fact that applying Title II based regulations

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[14] *See* 5 U.S.C. § 553(c); *State Farm*, 463 U.S. at 43 (requiring a "rational connection between the facts found and the choice made"); *New England Coalition on Nuclear Pollution v. Nuclear Regulatory Com*., 727 F.2d 1127, 1131 (D.C. Cir. 1984) ("[A]n agency rule must be accompanied by a statement of basis and purpose . . . which demonstrates a 'rational connection between the facts found and the choice made.'"); *Bechtel v. FCC*, 957 F.2d 875, 881 (D.C. Cir. 1993) (agency policy must be supported by valid factual predicate); *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (a rule must be consistent with its basis); *Menorah Medical Center v. Heckler*, 768 F.2d 292, 295 (8th Cir. 1985) (agency must supply an adequate basis-and-purpose statement for its rules); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 767-68 (6th Cir. 1995) (factual assumptions which support an agency rule must be valid).

[15] *See* 47 U.S.C. § 303(r) ("[T]he Commission from time to time, as public convenience, interest, or necessity requires, shall . . . make such rules and regulations . . ., not inconsistent with law, as may be necessary to carry out the provisions of this chapter."); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 793 (1978).

[16] *See* National Consumer Law Center Comments at 8 ("The Commission must not leave it to the marketplace to provide these consumer protections. That is tantamount to the fox guarding the henhouse.")

[17] *See, e.g., National Mining Association v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999) (observing that "regulation is both arbitrary and capricious because it is irrationally overbroad, and we therefore vacate it").

to broadband Internet access offerings of CMRS providers would be inconsistent with the competitive, unregulated framework established by Congress in 47 U.S.C. § 332.

II. STATE PLEAS FOR AUTHORITY TO REGULATE BROADBAND INTERNET ACCESS FAIL TO ADDRESS THE NATIONAL POLICY AGAINST REGULATION AND THE INTERSTATE NATURE OF THE INTERNET

Many states and associated commenters urged the Commission to allow state regulation of broadband Internet access, in one form or another, in the name of consumer protection.[18] *None* of the state regulators, however, addressed — or, for that matter, even acknowledged — the fact that Congress has already made the policy decision to rely on market forces, rather than federal *or state* regulation, where the Internet is concerned. *None* of the state regulators, moreover, confronted the fact that the Internet is inherently interstate in nature and is therefore not subject to direct state regulation (as opposed to being subject to state laws of general applicability) at all, under the Commerce Clause or even 47 U.S.C. § 152(b).

The state regulators, instead, appear to approach broadband Internet access as though it is a telecommunications service like all the other services they regulate and thus assume that the Internet falls within their regulatory jurisdiction. This view, however, is directly contrary to both the Congressional mandate of Internet nonregulation and extensive Commission precedent holding — as in the *Wireline Broadband Order* — that Internet access is both interstate and an information service, and is therefore not subject to state regulation.

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[18] *See, e.g.,* Alaska Comments; Hawaii Comments; New Jersey Division of the Ratepayer Advocate Comments; New York State Department of Public Service Comments; Public Utilities Commission of Ohio Comments; *see also* NARUC Comments; NASUCA Comments.

III. THE COMMISSION MUST REJECT CLECS' PLEA FOR A RETURN TO TITLE II REGULATION

The CLECs, represented by Comptel and Pac-West, ask the Commission to return to Title II common carrier regulation for broadband Internet access. That request must be rejected.

This request is well beyond the scope of this proceeding, which focuses exclusively on what, if any, consumer protections should be imposed pursuant to Title I.[19] Comptel and Pac-West argue that the Commission should impose such protections solely pursuant to Title II, rather than Title I.[20] Indeed, Comptel argues that the Commission's authority to adopt such regulations under Title I is "particularly questionable."[21]

Moreover, the request must be rejected because the CLECs make no secret of the fact that they seek to revisit the classification of broadband Internet access via DSL and cable modem as an "information service" rather than as a Title II "telecommunications service." That amounts to an untimely request for reconsideration of a matter that has been finally decided by the Commission in its *Cable Modem Order*[22] and *Wireline Broadband Order,*[23] the first of which has

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19 *NPRM* at ¶ 146 ("This framework necessarily will be built on our ancillary jurisdiction under Title I").

20 *See* Comptel Comments at 2-4; Pac-West Comments at 1-2.

21 *See* Comptel Comments at 4. Ironically, in opposing the use of Title I as a basis for regulation of broadband Internet access, the CLECs agree with Cingular and other commenters that the Commission's Title I authority to impose such regulations is highly constrained at best and should not be used as the basis for adopting consumer protection regulations for broadband Internet access. *See* Cingular Comments at 3-5; Comcast Comments at 9-11; Time Warner Comments at 5-7.

22 *High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking,* 17 F.C.C.R. 4798 (2002) (*Cable Modem Order*), *aff'd sub nom. National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005), *rev'g Brand X Internet Services, Inc. v. FCC*, 345 F. 3d 1120 (9th Cir. 2003).

23 *See* note 1 above.

been upheld by the U.S. Supreme Court in *Brand X*.[24] Under Section 405, the Commission lacks jurisdiction to reconsider a decision in response to a request filed more than thirty days after public notice.[25] Accordingly, to the extent the CLECs seek to revisit these decisions and reimpose Title II regulation, their comments cannot be considered.

The CLECs also overlook the fact that the offering of broadband Internet access by providers other than ILECs has never been subject to mandatory Title II regulation in the first place. The Commission has never treated cable operators and traditional internet service providers, for example, as telecommunications carriers when they offer broadband Internet access (unless they chose to provide their service as a common carrier offering[26]). For these providers, there is no Title II regulation to which the Commission may return. Likewise, the broadband Internet access services provided by many wireless companies have never been deemed telecommunications services subject to Title II. The CLECs ignore these providers because their exclusive focus is on DSL-based broadband Internet access, which has been offered in the past by ILECs (and some CLECs) as a Title II telecommunications service. In other words, they are really seeking to reverse the *Wireline Broadband Order,* and they are too late.

IV. THE COMMISSION SHOULD NOT ADOPT REGULATIONS DESIGNED TO PROTECT PARTICULAR COMPANIES' BUSINESS MODELS

Several commenters urged the Commission to adopt regulations that are designed simply to protect business models that are founded on particular regulatory paradigms applicable to

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[24] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005)

[25] 47 U.S.C. § 405(a).

[26] As DSLnet points out, the Commission has permitted the provision of the transport component of broadband Internet access as a telecommunications service and continues to do so. DSLnet takes advantage of this policy to obtain loops and transport as UNEs. *See* DSLnet Comments at 2.

wireline telephone service.[27] These commenters' requested regulations relate to the provision of telephone service, not broadband Internet access, and are thus neither within the scope of this proceeding nor a logical outgrowth of it.[28] Under the APA, it would not be proper for the Commission to adopt these rules here even if they were otherwise warranted.[29]

In any event, the proposed rules are not warranted. There is no justification for adopting regulations applicable to broadband Internet access that would apply particular business models to telephone services that may or may not be provided by means of such Internet access.[30] In fact, in some cases the telephone services that a consumer may obtain by means of his or her broadband Internet connection are provided by a company other than the access provider without the participation or knowledge of the broadband access provider. There is no record basis for finding any rational relationship between the requested rules' objectives, which largely pertain to telephone services, and the party to whom the rules would apply, which is the provider of broadband Internet access. Under these circumstances, there would be no basis for imposing

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[27] For example, 3PV is a company that performs verification of long-distance carrier switching; it urges the Commission to apply third-party verification requirements to VoIP. *See* 3PV Comments at 7-14. This proceeding, however, is not concerned with the provision of VoIP-based long-distance service; it is addressing the provision of broadband Internet access, and even 3PV does not claim that third-party verification has any role to play in the provision of broadband Internet access. Likewise, the Alarm Industry Association's comments pertain to the provision of redundancy and power backup in connection with telephone services provided over a broadband pipe. *See* Alarm Industry Association Comments at 3-5. Similarly, Verisign's comments pertain to certain CPNI issues related to the provision of telephone services over broadband, as opposed to the provision of broadband Internet access. *See* Verisign Comments at 2-9.

[28] *See Northeast Md. Waste Disposal Auth. v. EPA*, 383 F.3d 936, 952 (D.C. Cir. 2004).

[29] *See id;* 5 U.S.C. § 553.

[30] *See Alascom,* 11 F.C.C.R. 732, 758 (1996) (FCC's "statutory responsibility is to protect competition, not competitors."); *see also Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (finding that the Commission cannot subordinate the public interest to the interest of "equalizing competition among competitors").

such regulations on broadband Internet access providers, even if the issue could be resolved in this proceeding. Any such regulations would inherently be arbitrary and capricious.

CONCLUSION

For the foregoing reasons, and those stated in Cingular's comments, the Commission should decline to adopt the proposed regulations.

Respectfully submitted,

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